



No. 77-631

In the Supreme Court of the United States

OCTOBER TERM, 1977

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND GEORGE R. ALEXANDER, JR., REGIONAL ADMINISTRATOR, PETITIONERS

v.

REPUBLIC STEEL CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

WADE H. McCREE, JR.,

Solicitor General,

Department of Justice,

Washington, D.C. 20530.

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Respondent Republic Steel Corporation has filed a brief in opposition that disputes the petition's characterization of the opinion of the court of appeals and attempts to distinguish the cases that, in our view, squarely conflict with the decision below. We see no need to add, in these respects, to what we have said in the petition. Three points, however, deserve elaboration.

1. Republic argues (Br. in Opp. 10, 17) that the case is unimportant because "July 1, 1977, is now

passed" and because Congress has agreed on amendments to the statute that "provide for extensions of the July 1, 1977, compliance date." These arguments, of course, conflict. To the extent that the July 1, 1977, date is extended, the problem that has arisen in this case will arise again. The problem will recur whenever a deadline for compliance is reached, as long as the Administrator has not promulgated nationwide guidelines. Indeed, the problem will recur when the Administrator attempts to enforce the 1983 deadline for achievement of the best available technology economically achievable. In view of the Administrator's decision not to issue guidelines for some categories of point sources (see note 6, *infra*), the problem presented by this case will be important for as long as polluters continue to be confronted with deadlines under the statute.

In any event, contrary to the implication of the brief in opposition, Congress has not agreed to provide extensions of the July 1, 1977, compliance date, either generally or on a case-by-case basis. It has agreed only to authorize the Administrator to grant such extensions in cases where he determines that specified conditions are met.

We have noted (Pet. 17-18 n. 18) that the Senate, on August 4, 1977, passed a bill (S. 1952, 95th Cong., 1st Sess.) giving the Administrator limited authority to extend the compliance deadline, in terms essentially identical to the Agency's existing Enforcement Compliance Schedule Letter (ECSL) program. The Senate Committee stated that "[t]his authorization of limited flexibility granted to the Administrator will maintain

the pressure for compliance while at the same time enabling the Administrator to use his discretion to grant any justifiable extension" (S. Rep. No. 95-370, 95th Cong., 1st Sess. 62 (1977)).

The report of the Conference Committee was filed on December 6, 1977; it adopts the approach of the Senate bill. The bill agreed on by the conferees would amend Section 309(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. V) 1319(a), by adding a new paragraph (5)(B), which would provide:¹

The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 301(b) (1)(A) to a date which will achieve compliance

¹ 123 Cong. Rec. H12698 (daily ed., December 6, 1977); see also H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. (1977), reproduced at 123 Cong. Rec. H12704-H12722 (daily ed., December 6, 1977).

at the earliest time possible but not later than April 1, 1979.

This provision presupposes that the July 1, 1977, deadline is enforceable, both under the existing law and under the proposed amendment. The court of appeals in this case has rejected that supposition, and its decision would undercut the amended statute just as it undercuts the existing one. Moreover, although the amendment would give the Administrator a carefully-shaped discretion to extend or enforce the deadline, the court of appeals has denied him that discretion, a denial that would preclude enforcement under the amended Act whenever nationwide guidelines have not been promulgated. The existence of the discretion is important, for there is no certainty that Republic, or similarly situated polluters, would be able to demonstrate to the Administrator's satisfaction that they were entitled to the extension that the Administrator is authorized to grant.²

We therefore submit that the Court should review this case, in order to restore to the Administrator the authority to enforce the July 1, 1977, deadline in an important class of situations.

2. Republic argues (Br. in Opp. 10) that we have "fail[ed] to cite any litigation generated or affected

² The Conference Report confirms that the conference bill continues "the existing enforcement policy of the EPA." 123 Cong. Rec. H12715 (daily ed., December 6, 1977). The conferees also state "that during such time of compliance, the Administrator may require a point source to meet any interim levels of treatment as he deems appropriate under the circumstances" (*id.* at H12715-H12716). This, too, is impossible under the judgment of the court of appeals.

by this decision, and widespread litigation cannot be presumed * * *." We did not cite such litigation because, at the time the petition was filed, the effects of the decision had not yet been felt. But now they have been.

In *Ford Motor Co. v. United States Environmental Protection Agency*, C.A. 6, No. 76-1463, decided December 6, 1977, a divided panel of the court of appeals held that the Administrator could not object to revisions that a State made in a permit to a major polluter "because [his objection] was not based upon any published regulation or guideline" (App. A, *infra*, p. 2a).³ Although the revision of the permit significantly increased the amount of discharge allowed, the panel, relying in part on the instant decision, concluded that in the absence of federal guidelines no permit revision is "outside the guidelines and requirement" of the Act, and thus no permit revision may be objected to by the Administrator (*id.* at 21a). This decision magnifies the effect of the present case by making the promulgation of guidelines a precondition not only to enforcement of the deadlines in the Act but also to control of the amount of discharge any polluter may be permitted to make. If the *Ford* panel has correctly interpreted the instant decision, it means that, in the absence of guidelines, the statute cannot be enforced at all.⁴

³ We have reproduced this opinion as Appendix A, *infra*.

⁴ The decision has also been relied on as a defense to enforcement of permit provisions (compare Br. in Opp. 10). The United States commenced an action to enforce the limitations contained in a permit, and the district court granted summary judgment for the

3. We stated (Pet. 12 n. 9) that the decision below "conflicts in principle" with *Natural Resources Defense Council, Inc. v. Train*, 510 F. 2d 692, 710-711 (C.A. D.C.), because the Court of Appeals for the District of Columbia Circuit there invited the Administrator to pretermitt the promulgation of guidelines for certain categories of sources. Since the petition was filed, the conflict with the District of Columbia Circuit has become more pronounced. In *Natural Resources Defense Council, Inc. v. Costle (Runoff Point Sources)*, C.A. D.C., No. 75-2056, decided November 16, 1977,⁵ that court once more invited the Administrator to enforce the statute without promulgating guidelines.⁶

In *Runoff Point Sources* the Administrator argued that it was impossible to promulgate guidelines for certain types of sources and, indeed, that it was impossible to determine discharge levels for them. He therefore attempted to exempt those sources from the permit requirement of the Act. The court of appeals

United States, leaving open only the issue of remedy. *United States v. Velsicol Chemical Corp.*, W.D. Tenn., Civ. No. C-75-462, summary judgment granted, November 10, 1976. Velsicol moved to set aside the summary judgment, relying on the court of appeals' decision here. The motion was argued and denied orally on November 28, 1977. Although this effort to capitalize on the present decision was unsuccessful, there will doubtless be more such efforts, and it is possible that not all of them will fail.

⁵ We have reproduced this opinion as Appendix B, *infra*.

⁶ The Administrator, relying on these invitations, has concluded that the best administrative practice is to proceed without guidelines in certain categories of cases. This conclusion makes it inevitable that the problem presented by this case will recur when the 1983 deadline is reached.

held, however, "that Congress intended the NPDES permit to be the only means by which a discharge from a point source may escape the total prohibition of § 301(a)," and that the attempted exemption was therefore ineffective and simply left each discharger "subject to the total proscription of § 301" (App. B, *infra*, pp. 42a-43a)—that is, forbidden to discharge anything. If even a considered attempt by the Administrator himself to exempt some sources from the Act's requirements is unacceptable, the mere failure to promulgate national discharge guidelines in timely fashion cannot reasonably operate to suspend the Act's requirements for a period of years.

Runoff Point Sources was a case in which technological infeasibility prevented the issuance of national guidelines. The court of appeals nevertheless concluded that discharge limitations could be written into individual (or area-wide) permits even in the absence of national guidelines (App. B, *infra*, pp. 48a-53a). The court discussed its earlier opinion in *Natural Resources Defense Council, Inc. v. Train* and explained that "technological or administrative infeasibility [in issuing guidelines] was a reason for adjusting court mandates to the minimum extent necessary to realize the general objectives of the Act" (App. B, *infra*, p. 52a; footnote omitted). The decision below to lift the July 1, 1977, deadline because of the Administrator's inability to promulgate the guidelines is not "necessary to realize the general objectives of the Act." Rather, it defeats them.

For these reasons, in addition to the reasons discussed in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

APPENDIX A

No. 76-1463

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FORD MOTOR COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

and

STATE OF MICHIGAN,

Intervenor.

ON PETITION to review
action of the Admin-
istrator of the United
States Environmental
Protection Agency.

Decided and Filed December 6, 1977.

Before: WEICK and ENGEL, Circuit Judges, and WEINMAN,
Senior District Judge.*

WEICK, Circuit Judge, delivered the opinion of the Court, in which WEINMAN, Senior District Judge, joined. ENGEL, Circuit Judge, (pp. 22-32) filed a separate dissenting opinion.

WEICK, Circuit Judge. The principal question before us is whether the Environmental Protection Agency [EPA] properly vetoed modifications in Ford Motor Company's [Ford] existing National Pollutant Discharge Elimination System [NPDES] permit which were proposed by the Michigan Water Resource

* The Hon. Carl A. Weinman, Senior Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Commission [MWRC] pursuant to the Federal Water Pollution Control Act of 1972 [FWPCA] §§ 101, *et seq.*, 33 U.S.C. §§ 1251, *et seq.* Ford has petitioned for review of EPA's veto of the permit modifications. We hold that the veto of EPA was invalid because it was not based upon any published regulation or guideline or on any express statutory provision.

I

In order fully to understand the issues, a review of the pertinent provisions of the FWPCA is necessary. Congress declared that the objective of the Act was "to restore and maintain the chemical, physical and biological integrity of the Nation's waters" § 101(a), 33 U.S.C. § 1251(a). One of the national goals of the Act was to eliminate by 1985 "the discharge of pollutants into navigable waters." § 101(a)(1). Furthermore, Congress proclaimed by the Act its policy to have the States participate in the prevention, reduction and elimination of pollution. § 101(b). Congress also stressed the need for public participation "in the development, revision and enforcement of any regulation, standard, effluent limitation, plan or program established by the Administrator or any State" and required the publication of "regulations specifying minimum guidelines for public participation in such processes." § 101(a).

The Supreme Court in *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 204-05 (1976), noted one of the purposes of the Act:

First, the Amendments are aimed at achieving maximum "effluent limitations" on "point sources," as well as achieving acceptable water quality standards. A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."⁹ An "effluent limitation" in turn is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged

from point sources . . . including schedules of compliance."¹⁰ Such direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based¹¹ effluent limitations — specified levels of treatment — to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform.¹²

⁹ § 502 (14), 33 U.S.C. § 1362 (14) (1970 ed., Supp. IV). The terms "pollutant" and "discharge of pollutant" are defined in §§ 502 (6), (12), 33 U.S.C. §§ 1362 (6), (12) (1970 ed., Supp. IV).

¹⁰ § 502 (11), 33 U.S.C. § 1362 (11) (1970 ed., Supp. IV). Section 502 (17) defines a "schedule of compliance" to be "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362 (17) (1970 ed., Supp. IV).

¹¹ Point sources other than publicly owned treatment works must achieve effluent limitations requiring application of the "best practicable control technology currently available" by July 1, 1977, and application of the "best available technology economically achievable" by July 1, 1983. §§ 301 (b) (1) (A), (2) (A), 33 U.S.C. §§ 1311 (b) (1) (A), (2) (A) (1970 ed., Supp. IV).

¹² Water quality standards are retained as a supplementary basis for effluent limitations, however, so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels. See §§ 301 (e), 302, 303, 33 U.S.C. §§ 1311 (e), 1312, 1313 (1970 ed., Supp. IV).

The EPA Administrator was required after consultation with the appropriate federal and state agencies and other interested persons, to adopt regulations providing guidelines for effluent limitations no later than October 18, 1973 and annually thereafter. § 304(b)(2), 33 U.S.C. § 1314(b)(2). Once these guidelines were provided they were to be followed when NPDES permits were issued and were "to serve as the basis of the administrator's veto of objectionable permits." *CPC Int'l, Inc. v. Train*, 515 F.2d 1032, 1039 (8th Cir. 1975).

Compare *E. I. duPont deNemours & Co. v. Train*, 430 U.S. —, n.24, 45 U.S.L.W. 4212, 4218 n.24 (U.S. Feb. 23, 1977).

The EPA Administrator also was authorized to promulgate effluent limitations for classes and categories of existing point sources which necessarily serve as a basis for denial of a permit. See § 301, 33 U.S.C. § 1311; *E. I. duPont deNemours & Co. v. Train*, *supra*; and *American Iron and Steel Inst. v. EPA*, 526 F.2d 1027, 1041 (3d Cir. 1975).

The Court in the *duPont* case explained at 4217 the function of the § 304(b) guidelines and at the same time their relation to § 301 regulations:

As we noted earlier, § 304(b) requires EPA to identify the amount of effluent reduction attainable through use of the best practicable or available technology and to "specify factors to be taken into account" in determining the pollution control methods "to be applicable to point sources . . . within such categories or classes." These guidelines are to be issued "[f]or the purpose of adopting or revising effluent limitations under this Act." As we read it, § 304 requires that the guidelines survey the practicable or available pollution control technology for an industry and assess its effectiveness. The guidelines are then to describe the methodology EPA intends to use in the § 301 regulations to determine the effluent limitations for particular plans. [footnote omitted]

Congress also provided a plan for implementing water quality standards, which addressed the problem of concentration of pollutants in particular bodies of water, to meet the purposes and goals of the FWPCA.

Section 303(a), 33 U.S.C. § 1313(a) provides for state-adopted water quality standards including those state standards adopted prior to the FWPCA, which standards meet the requirements of the FWPCA unless otherwise determined by the EPA Administrator. For instance, on September 21, 1973 the

State of Michigan, pursuant to the FWPCA, approved new water quality standards which went into effect on December 12, 1973. Michigan Water Quality Standards, Michigan Administrative Code Part 4; Rule 323.1041, *et seq.* Because EPA took no action on the Michigan standards, they became the federal water quality standards in that state. See § 303(c)(3), 33 U.S.C. § 1313(c)(3).

Moreover, the EPA Administrator, after issuing notice and holding a public hearing, has authority to establish more restrictive effluent limitations to "discharges of pollutants from a point source or group of point sources" which (even though the effluent limitations under § 301(b)(2) (best available control technology) are applied to the point sources) would still be interfering "with the attainment or maintenance of that water quality in a specific portion of the navigable waters . . .". § 302(a) and (b), 33 U.S.C. § 1312(a) and (b).

The Supreme Court in the *State Water Resources* case also explained a second purpose of the FWPCA, 426 U.S. at 205:

Second, the Amendments establish the National Pollutant Discharge Elimination System (NPDES)¹³ as a means of achieving and enforcing the effluent limitations. Under NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms.¹⁴ An NPDES permit serves to transform generally applicable effluent limitations and other standards — including those based on water quality — into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. §§ 309 and 505, 33 U. S. C. §§ 1319, 1365 (1970 ed., Supp. IV). With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. § 402(k), 33

U. S. C. § 1342(k) (1970 ed., Supp. IV). In short, the permit defines, and facilitates compliance with and enforcement of, a preponderance of a discharger's obligations under the Amendments.

¹³ § 402, 33 U.S.C. § 1342 (1970 ed., Supp. IV).

¹⁴ Section 301 (a), 33 U.S.C. § 1311 (a) (1970 ed., Supp. IV), makes unlawful "the discharge of any pollutant by any person" except in compliance with numerous provisions of the Amendments, including § 402 which establishes NPDES.

In effect, the NPDES terminates operation of the Refuse Act permit program. §§ 402(a)(4), (5), 402(k), 33 U.S.C. §§ 1342 (a)(4), (5), 1342 (k) (1970 ed., Supp. IV).

EPA is empowered by Congress to issue these permits. § 402, 33 U.S.C. § 1342. However, the Act also provides that these permits may be issued by the States. If a State desires to administer the program pursuant to the Congressional policy of State control over water pollution, EPA must first approve the State's permit program. See § 402(b). Once the Administrator's approval is given, the State may issue NPDES permits as long as the permits meet the requirements of the FWPCA. Among its duties under the permit program, the State must "provide an opportunity for public hearing before a ruling on each such application [for a permit]" and provide the Administrator with "notice of each application (including a copy thereof) for a permit." § 402(b)(3) and (4). On October 17, 1973 the EPA Administrator approved the permit program of the State of Michigan. 39 F.R. 26061 (July 16, 1974).

In addition to EPA's possible withdrawal of its approval of a State's permit program under § 402(c), EPA also retains a veto power over a State's issuance of an individual permit. Section 402(d)(2)(B) provides:

No permit shall issue . . . if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance

of such permit as being *outside the guidelines and requirements of [the Act]*. [Emphasis added]

The aggrieved party has ninety days from the date of denial of the permit under § 402 in which to seek review of the Administrator's action, by petition therefor filed in the appropriate United States Court of Appeals. § 509(B)(1)(F), 33 U.S.C. § 1369(b)(1)(F).

II

Ford operates a stamping plant in Monroe, Michigan. Each day the plant produces 40,000 steel automobile wheels, 16,000 bumpers and numerous coil springs. The plant discharges into the Raisin River less than one mile above the river's point of entry into Lake Erie, various metals, such as chromium, copper, nickel and zinc.

On June 30, 1971 Ford applied for a NPDES discharge permit for its Monroe plant.¹ On the application form at the place noted for intake sources, Ford indicated that it planned to pump 147 million gallons [MGD] of water per day from Lake Erie, treat 10 MGD for the plant millwater supply, and discharge the excess (137 MGD) into a plant-owned canal, a dilution water canal, which in turn discharges the water into the Raisin River. Later, in November 1973, Ford revised its permit application.

In August, 1974 EPA questioned among other things, Ford's proposed use of the entire Raisin River as a "mixing zone." Under Michigan Water Quality Standards Rule 1043(n) a "mixing zone" is "a region of a water body which receives a wastewater discharge of a different quality than the receiving waters, and within which the water quality standards as prescribed by these rules do not apply." The State of Michigan

¹ Originally Ford applied for the permit under the Rivers and Harbors Act of 1899, 33 U.S.C. § 407. When the FWPCA was passed, its permit application was deemed a request under the new Act. § 402 (a) (5), 33 U.S.C. § 1342(a) (5).

does not allow use of more than 25% of the stream as a mixing zone "unless it can be demonstrated [to the MWRC] that designation of a greater area or volume of streamflow will allow passage of fish and fishfood organisms so that effects on their immediate and future populations are negligible or not measurable." Rule 1082 of the Michigan Water Quality Standards.

EPA, based on a bioassay conducted by the MWRC in April, 1973, also questioned Ford's ability during the Raisin River's low flow period, to meet the water quality standard concentration limits.

In September, 1974 EPA again questioned the use of the entire width of the Raisin River as a mixing zone and suggested that Ford use only one-half of the river. MWRC soon responded to the EPA suggestion and revised the mixing zone to include "the total flow in the River Raisin from the point of discharge to the Detroit Edison Power Plant intake" (which intake is about 900 feet distant from the Ford discharge). MWRC stated that "[t]he effluent restrictions placed on the Ford Motor Company Monroe Plant discharge are more restrictive than the promulgated guidelines."

On December 20, 1974 the State of Michigan, pursuant to the approval of MWRC, issued Ford the NPDES permit on its Monroe Plant. The permit included the mixing zone as suggested to EPA by MWRC, *supra*. EPA did not veto the permit and it became effective.

On July 11, 1975 MWRC at Ford's suggestion, sent to EPA a proposed modification of Ford's Monroe Plant permit. Among other things, MWRC proposed use of flow augmentation for Ford to meet water quality standards. Ford, in its brief to this Court, stated:

The term "flow augmentation" as described in the proposed permit refers to the mixing of the treated effluent from the plant with other waters (from a mixing canal on the plant property [which water was obtained from Lake Erie]) in order to reduce the concentration of

pollutants to levels specified in the permit and to assure compliance with the concentration limits in the water quality standard for the river into which the effluent is ultimately discharged.

The proposed modification was succinctly stated by Jeffrey G. Miller, EPA Deputy Assistant Administrator for Water Enforcement:

The relevant facts are that the best practicable technology will achieve necessary reduction in pounds of pollutants discharged but that the resulting concentration in the volume of process effluent is still greater than concentration limits specified in the Michigan Water Quality Standards. The State proposes to allow flow augmentation (dilution) to meet the water quality standard concentration limitations. Monitoring for compliance with the BPT limitations is to be done prior to dilution. Monitoring for compliance with the water quality standards concentration limitations is to be done at the downstream edge of the mixing zone. The mixing zone for purposes of evaluating compliance with the State's water quality standards is defined as the total flow in the Raisin River from the point of discharge to the Detroit Edison Power Plant intake, a distance of approximately 900 feet. The State concedes that a mixing zone generally should not include an entire river but claims that Michigan biologists are confident that fish passage will be assured if the concentration limits are not exceeded.

Initially, in August, 1975 in a telephone conversation between Harry J. Clemens of EPA's Region V Permit Branch and Carl Schafer of EPA's Washington headquarters, EPA believed that use of flow augmentation in the mixing zone and receiving water was proper so long as the best practicable control technology [BPT] currently available was being applied and that the flow augmentation was not being used to

"dilute to meet [the best available technology economically achievable]". In fact, in the next three communications between EPA and MWRC, no objections were raised with respect to the use of flow augmentation.

On October 1, 1975 however, in a letter from Dale S. Bryson, the Region V EPA Deputy Director Enforcement Division, to Roy Schrameck, MWRC's Division Permit Coordinator, EPA again questioned whether fish passage on the river was possible due to the large size of the mixing zone, and requested studies from MWRC pursuant to Rule 1082 of the Michigan Water Quality Standards to demonstrate fish passage in the river. More importantly, EPA expressed displeasure with the use of flow augmentation to meet the water quality standards. Mr. Bryson said:

The plan to allow the company to treat their metal plating wastes to the BPT level and then dilute with cooling water and possibly flow augmentation to meet water quality standards is in conflict with the intent of the Federal 1972 Amendments and EPA Policy. Dilution should not be utilized unless additional treatment is unavailable or economically unreasonable. Treatment at the BPT level is not usually the point at which additional treatment is considered economically unreasonable. Therefore, please submit any documentation which purports to demonstrate that additional treatment is unreasonable and that flow augmentation is the only available approach. This should be done on a process by process and parameter by parameter basis and should also include the anticipated effect this additional pumpage would have on entrainment and impingement impacts on the fish population in the surrounding nursery and spawning areas and migratory routes.

Despite the above letter, on October 7, 1975 Robert J. Courchaine, Chief Engineer of MWRC formally submitted to EPA (Bryson) the proposed modifications on Ford's Monroe Plant permit which included a control of heavy metal con-

centration that would assure uninterrupted fish passage "accomplished on a continuing basis by low-flow augmentation, an acceptable water quality management tool." Mr. Courchaine emphasized that the proposed permit modifications required filtration as an additional BPT treatment step.²

On October 17, 1975 Paul Zugger, Assistant Regional Engineer of the Bureau of Water Management of MWRC wrote Harry Clemens of EPA, informing him that the chlorine limit in Ford's permit would be revised to facilitate fish passage in the mixing zone.

On October 20, 1975 Bryson of EPA wrote a letter to Miller of EPA requesting information "as soon as possible as to the national policy" on flow augmentation. Bryson said that his office was opposed to the use of "flow augmentation to achieve lower concentration in the effluent to comply with their Water Quality Standards."

On November 3, 1975 Mr. Courchaine of MWRC, pursuant to Bryson's letter to MWRC on October 1, 1975, requested from Ford "documentation to justify the use of flow augmentation" which would "show why treatment beyond [the] present proposal, BPT plus filtration, to meet water quality standards is economically and/or technically unfeasible."

In response to Bryson's request of October 20, 1975 concerning the subject of flow augmentation to achieve water

² The proposed permit modification as to discharge limitations beginning on July 1, 1977 states:

These limitations are based on water quality considerations. Flow augmentation, or dilution, can be used to meet these limitations if, and only if, the following treatment facilities, when operated to produce an optimum effluent, are not capable of achieving such limitations:

- destruction of cyanide by oxidation
- reduction of hexavalent chromium to the trivalent form
- neutralization
- coprecipitation and settling
- filtration

Such facilities are to be constructed from plans and specifications approved by the Chief Engineer of the Michigan Water Resources Commission.

quality standards, Miller on January 14, 1976 sent to Bryson his written memorandum, which memorandum concluded that flow augmentation at the Ford Plant was unacceptable. Miller stated:

You ask whether the proposed flow augmentation to meet water quality standards is a valid approach and whether it might set a national precedent for dischargers in any area where sufficient water is available for dilution pumping.

To the extent that concentration limitations alone do not control the actual amount of pollutants discharged, they may be generally considered as protection against localized acutely toxic conditions that would endanger aquatic life or serve as a barrier to free passage to up-river reaches. This being the case, achievement of concentration limits *per se* becomes a requirement for diffusion of the discharge and the specification of a mixing zone indicates the degree of diffusion required.

An important element of the case in question, and any similar case, is that BPT reductions or, ultimately, the BAT reductions of pollutant pounds discharged or any more stringent reductions required by load allocations must be met before flow augmentation may be allowed.

In the instant case, the upstream concentration of pollutants expressed as pounds based on total river flow *plus* the BPT allowance of pounds of pollutants discharged after dilution exceed the in-stream concentration limitations. We, therefore, do not see flow augmentation as being consistent with the requirements of the *in-stream* concentration limits contained in the water quality standards.

As regards to national policy and the establishment of precedent, it would not appear that any policy guideline can be laid down either flatly prohibiting or approving flow augmentation to achieve a given water quality stan-

dard, nor that the decision for or against such dilution in a given case can be cited as a precedent for a general position.

Please note that there is a definite distinction between the *effluent* concentration limits and the *in-stream* concentration limits specified in water quality standards. It must be clear however, that BPT or any more stringent limitation of pounds derived from load allocation of assimilative capacity or other water quality standards must be met before the question of flow augmentation to achieve diffusion oriented limitations can be considered.

Therefore, on January 22, 1976 Mr. Bryson of EPA informed Mr. Courchaine of MWRC by letter that MWRC's proposed permit modifications on the Ford Monroe Plant were denied. Bryson stated that "[t]reatment to BPT supplemented by dilution to meet water quality standards is not compatible with the requirements of [the FWPCA]." Attached to the letter was Miller's memorandum of January 14, 1976, *supra*, as justification for EPA's action.³ EPA stated to MWRC that Miller's memorandum made "two important points about the inconsistency of the proposed permit with national policy." These two points were stated as follows:

1. Flow augmentation is not consistent with the requirements of the in-stream concentration limits contained in water quality standards.
2. BPT or any more stringent limitation of pounds derived from load allocation of assimilative capacity or other water quality standards must be met before the

³ On November 8, 1976 EPA through its Office of General Counsel again addressed the subject on the use of low-flow augmentation by point sources to meet water quality standards. In a memorandum addressed to the EPA Regional Administrators and the State NPDES Directors, the General Counsel's Office expanded upon Miller's memorandum into a full treatment of the subject. EPA's arguments against the general use of low-flow augmentation to meet water quality standards are repeated by its attorneys in its brief before this Court.

question of flow augmentation to achieve diffusion oriented limitations can be considered.

On April 20, 1976 pursuant to § 509(b)(1)(F) of the Act, 33 U.S.C. § 1369(b)(1)(F), Ford petitioned this Court to review the January 22, 1976 decision of EPA denying the permit modifications for the Monroe Plant.

III.

Initially, EPA contends that actions taken by MWRC subsequent to its veto of the proposed permit modifications have mooted this case. Specifically, EPA argues that in May 1976 which was subsequent to the filing by Ford of its petition for review in this Court, MWRC decided not to continue to support the issuance of the NPDES permit on the Monroe Plant; agreed that EPA's refusal to concur in issuance was reasonable; and ordered an adjudicatory hearing to reconsider the need for the permit modifications. Therefore, EPA concludes that judicial review at this time is not appropriate because no controversy exists. It asserts that only if MWRC and/or EPA later refuse to issue the permit modifications, after an adjudicatory hearing record has been developed, should this Court review the action of EPA.

The State of Michigan as an intervenor also requests that this Court defer ruling on EPA's denial of the permit modifications until the administrative record can be developed through an adjudicatory hearing. The State concedes that it forwarded to EPA the proposed permit modifications without an adequate factual review.

The statute at § 509(b)(1)(F) is quite clear however, in conferring upon this Court jurisdiction to review the EPA Administrator's action for denial of any permit under § 402. There is no dispute by any party that EPA denied Ford modification on its Monroe Plant permit under § 402(d)(2)(B). We hold therefore, that the Administrator's action is properly before this Court subject to review. *Mianus River*

Preservation Comm. v. Administrator EPA, 541 F.2d 899, 909 (2d Cir. 1976) and *Shell Oil Co. v. Train*, 415 F. Supp. 70, 77-78 (N.D.Cal. 1976). Cf. *E. I. duPont deNemours & Co. v. Train*, *supra*, at 4219. The factual record in this case has been sufficiently developed that this Court can review adequately the action of EPA.

This Court is not reviewing the action of the State of Michigan to issue the revised permit with the proposed modifications, and the FWPCA does not foreclose the State from conducting further hearings in the matter. Nevertheless, Ford is entitled under the statute to have its day in court, and post-denial action by the State of Michigan (which obviously was reacting to EPA's veto of the proposed permit modifications) neither changes the action already taken by EPA nor moots this case. An actual controversy still exists between Ford and EPA. Accordingly, we will proceed to the merits of this case.

IV.

As noted above, the EPA Administrator has authority to refuse a NPDES permit proposed by the State if the Administrator, within ninety days of the State's transmittal of the proposed permit, objects to it in writing "as being outside the guidelines and requirements" of the FWPCA. § 402(d)(2)(B).

Ford argues that this statute provides the Administrator with but narrow review powers over a proposed permit when a State is supervising its own permit program under the FWPCA. Ford contends that EPA is exercising control over the effluent limitations in individual States on a plant-by-plant basis, even though the permits as in the present case, are not inconsistent with the published guidelines and explicit statutory requirements under the Act.

Although the issue as to whether the proposed permit modifications are or are not outside the guidelines and re-

quirements of the FWPCA is the main question to be decided in this case, there is little doubt that EPA has limited review powers over the issuance of a proposed permit submitted by a State pursuant to the State's own NPDES permit program under § 402. The FWPCA does vest final review authority with the Administrator for permits issued by the states (see the *duPont* case, *supra*, at 4219 n. 27) but since it was "believed that the states would shoulder the primary burden of issuing permits to individual dischargers," the "EPA duties were to be restricted to assuring that the state followed the procedural guidelines and to reviewing individual permits of major significance." *Natural Resources Defense Council, Inc. v. Train*, 166 U.S.App.D.C. 312, 510 F.2d 692, 709 (1975). See 1972 U.S. Code Cong. & Ad. News 3737. Cf. *Mianus River Preservation Comm. v. Administrator, EPA, supra*.

The permit involved raises an issue of "major significance," namely, the use of low-flow augmentation to meet water quality standards. This issue may have a major impact on many dischargers in the United States.

We now proceed to determine whether under § 10 of the Administrative Procedure Act, the Administrator's action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 171 (6th Cir. 1973); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1356 (4th Cir. 1976); and *Sierra Club v. EPA*, 176 U.S.App.D.C. 335, 540 F.2d 1114, 1123-24 (1976), *cert. denied*. — U.S. —, 45 U.S.L.W. 3667 (U.S. Apr. 4, 1977).

Under the "arbitrary and capricious" standard, the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) stated:

[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment Although this inquiry into the facts is to be searching

and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. [citations omitted]

Quoted with approval in *Buckeye Power, Inc. v. EPA, supra*, at 171.

Furthermore, EPA is held to a high standard of articulation. *Id.*, quoting from *Environmental Defense Fund, Inc. v. EPA*, 150 U.S. App.D.C. 348, 465 F.2d 528, 540-41 (1972).

Ford argues that EPA objected to the use of low-flow augmentation to meet water quality standards under the FWPCA solely upon EPA's own ad hoc policy determination as to effluent limitations at the Monroe Plant. Ford further contends that there are no published regulations, guidelines or specific statutory requirements under the FWPCA prohibiting the use of low-flow augmentation to meet water quality standards. Ford concludes therefore, that EPA exceeded its veto authority when it denied Ford the permit modification because § 402(d)(2)(B) allows EPA to object only to the issuance of NPDES permits which are *outside the guidelines and requirements* of the FWPCA, and not upon the EPA's private policy determination. In fact, Ford maintains that EPA's action in the present case denied Ford as a permittee, its statutory right to a hearing on the issues related to the permit. Ford argues that although § 402(b)(3) provides the permittee a right to a hearing under a state's permit program, EPA in effect renders this statutory right to a hearing a nullity when it declines to issue a NPDES permit for any policy reason, rather than upon "previously promulgated generic guidelines." We believe that the main thrust of Ford's argument is well taken.

It is clear from the record in this appeal that EPA had no prior well-established agency policy which prohibited the use of low-flow augmentation to meet water quality standards. In fact, in August 1975 two EPA officials appear

to have indicated initially that flow augmentation was proper. When Bryson, the Region V EPA Deputy Director, in October 1975 requested from Miller of EPA a memorandum on flow augmentation, Bryson did not even know the national policy of the agency on flow augmentation. Miller's response in a memorandum, the basis for EPA's veto of the proposed permit modifications, did not cite any statutory provision, regulation or guideline. As already noted, Miller stated:

[I]t would not appear that any policy guideline can be laid down either flatly prohibiting or approving flow augmentation to achieve a given water quality standard, nor that the decision for or against such dilution in a given case can be cited as a precedent for a general position.

EPA's November 1976 memorandum from the office of its General Counsel, on the subject of low-flow augmentation, contains this statement:

The [FWPCA] is silent on the question of whether this alternative is proper and legal as a method of meeting water quality standards based on concentrations.

Nonetheless, this memorandum stated that the EPA policy clearly discouraged the use of flow augmentation or dilution "as an alternative to treatment for meeting water quality standards," developing its reasoning from analogies on the statutory requirements under § 102(b)(1) of the Act, 33 U.S.C. § 1252(b)(1), and § 110(2)(B) of the Clean Air Act, 42 U.S.C. § 1857c-4(a)(2)(B). Such a position would undoubtedly be a good reason for publishing regulations or guidelines in the future on this subject, but it can hardly be a justification for vetoing the proposed permit modifications in the present case when the reasoning was adopted ten months after the veto. This Court can consider only the

grounds asserted by EPA in its letter of January 22, 1976 which vetoed the permit modifications.⁴

The Supreme Court in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962), stated, with reference to *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947):

The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:

"[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action" *Ibid.*

For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197), the administrative process, for the purpose of the rule is to avoid "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." 332 U.S., at 196.

See also *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806-07 (1973) (Marshall, J., speaking for the plurality). Cf. *Hooker Chemical & Plastics Corp. v. Train*, 537 F.2d 620, 634, 636 (2d Cir. 1976).

⁴ The November 1976 memorandum of EPA's general counsel also failed to cite any published guidelines and regulations on the subject of the use of low-flow augmentation to meet water quality standards.

Moreover, EPA's contention that Ford did not provide the necessary information to EPA or MWRC on the need for flow augmentation at the Monroe Plant and other related arguments cannot support EPA's veto because such "deficiencies" were not included in any part of EPA's veto letter. In other words, they are an afterthought.

An examination of the various statutory provisions of the FWPCA indicates that Congress among other things, directed EPA to publish guidelines and regulations setting forth the effluent limitations applicable to point sources. For example, § 304(a) required EPA to publish "criteria for water quality accurately reflecting the latest scientific knowledge" as to most aspects of water pollution and its effect on the aquatic environment, as well as to develop and publish information on the factors necessary to measure, restore and maintain water quality and to protect the aquatic environment. Section 304(b) required EPA to publish "regulations, providing for effluent limitations." Section 301(b) required EPA to publish regulations on effluent limitations for point sources. Section 302 directed EPA to publish regulations on water quality related effluent limitations where such limitations were necessary. Section 306(b) ordered EPA to "propose and publish regulations establishing Federal standards of performance for new [pollution] sources within" various industries. Section 307 required EPA to publish toxic and pretreatment effluent standards. These regulations and guidelines if violated, would serve as a basis for vetoing a NPDES permit. Compare *E. I. DuPont de Nemours & Co. v. Train*, 430 U.S. — n. 24, 45 U.S.L.W. 4212, 4218 n. 24 (U.S. Feb. 23, 1977) and *American Iron and Steel Inst. v. EPA*, 528 F.2d 1027, 1041 (3rd Cir. 1975) with *CPC Int'l, Inc. v. Train*, 515 F.2d 1032, 1039 (8th Cir. 1975). See also §§ 402(a)(1) and (b)(1)(A).

EPA has not met with difficulty in publishing necessary regulations and guidelines within the time framework contemplated by Congress for most industries.

The absence of such regulations and guidelines however, as well as the lack of specific statutory requirements under the Act relating to the use of flow augmentation to meet water quality standards precludes EPA's denial of a modification on a NPDES permit as to flow augmentation under § 502(d)(2)(B) because such modification is not "outside the guidelines and requirements" of the Act. Cf. *Republic Steel Corp. v. Train*, — F.2d —, No. 76-1557 (6th Cir. June 23, 1977). Without such guidelines and requirements, EPA could arbitrarily deny permit modifications and render state NPDES permit programs a farce. An industry would have difficulty in preparing its application for a permit without such guidelines. As Ford argued, a permittee would effectively be denied a hearing on issues related to the permit. In other words, EPA would be making decisions unfettered by administrative constraints, despite the congressional policy specifically providing therefor. § 101(e).

In the present case we are unable to find *any* "guidelines and requirements" in the FWPCA, or guidelines promulgated pursuant thereto upon which EPA on January 22, 1976 relied, to deny the NPDES permit modifications on the Ford Monroe Plant. Therefore, EPA's veto action under § 402(d)(2)(B) was a clear error in judgment and was arbitrary, capricious and an abuse of discretion. Ad hoc national policy determinations developed through internal agency memoranda standing alone without promulgating regulations or guidelines through public notice and/or an opportunity for a public hearing, are not proper procedures for EPA to enforce the FWPCA. See *Associated Indus. of Alabama v. Train*, 9 ERC 1561, 1568-69 (N.D. Ala. Dec. 6, 1976). Cf. *Natural Resources Defense Council, Inc. v. Train*, *supra*, at 706-10.

If the State of Michigan conducts further hearings on the proposed permit modifications at the Ford Monroe Plant, Ford and EPA may appear at these hearings to present their respective contentions with respect thereto.

Accordingly, EPA's veto of the proposed permit modifications at the Ford Monroe Plant is set aside. This case is remanded for further proceedings not inconsistent with this opinion.

ENGEL, Circuit Judge, dissenting.

I respectfully dissent. The practical effect of the majority opinion is to hold that if a pollution discharge is not expressly forbidden by the FWPCA, EPA regulations or state-adopted water quality standards, it is permitted.

In my opinion such a view runs counter both to the history and text of the Act, and in particular to the language of Section 301(a) of the Act, 33 U.S.C. § 1311(a), which in a straightforward manner states:

Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. §§ 1312, 1316, 1317, 1326, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

The use of flow augmentation is not authorized by any of the exceptions referred to in Section 301(a) of the Act.

As pointed out in the majority opinion, Michigan adopted its water quality standards effective December 12, 1973. Because the Administrator did not express his disapproval, they became standards under the FWPCA. Section 303(c)(3) of the Act, 33 U.S.C. § 1313(c)(3). Michigan's adopted water quality standards do not provide for flow augmentation even by inference. The EPA was not accorded the opportunity to pass upon the question of flow augmentation when the standards were submitted to it, there being no suggestion that the issue was ever raised.

Ford's Monroe plant is currently subject to a permit which does not include any authorization for the use of flow augmentation as a means of meeting the applicable water quality

standards. The NPDES permit issued Ford for its Monroe plant on December 20, 1974 was not vetoed by the EPA. Only six months later, however, a modification was sent to EPA, proposing the use of flow augmentation by Ford to meet the water quality standards for the Raisin River. The modification sought would allow Ford to draw water from nearby Lake Erie, thus raising the flow of the Raisin River at the point of discharge. The proposal would permit Ford to divert any volume of water in order to meet the concentration limits contained in the water quality standards.¹

Taking advantage of the fact that the Michigan water quality standards are stated on a per liter basis, the effect of the proposed permit modification would be to allow Ford to dilute its pollution to achieve the water quality standards without a reduction in the amount of pollutants it was discharging. With the modification Ford proposes to dump more than twice as much metallic sludge into the Raisin River as has previously been permitted.

It is true that if Michigan water quality standards do not condone, neither do they expressly condemn flow augmentation as a means of achieving acceptable concentrations of discharged pollutants. And it is true that the Administrator's power to veto under the Act may be exercised only when a permit is "outside the guidelines and requirements" of the Act, Section 402(d)(2) of the Act, 33 U.S.C. § 1342(d)(2). On this basis the majority holds that because it is unable to find any guidelines and requirements in the FWPCA or regulations promulgated under it upon which the EPA could rely to sustain its January 22, 1976 veto of the NPDES permit

¹ Ford originally sought approval for flow augmentation in 1971, when it applied for a discharge permit under the Rivers and Harbors Act, 33 U.S.C. § 407, the predecessor of the NPDES, Section 402(a)(5) of the Act, 33 U.S.C. § 1342(a)(5). While Ford's 1971 draft proposal projected its requirements at 137 million gallons a day, the permit modification at issue here imposes no ceiling on the quantity of water Ford could divert from Lake Erie. The modification, if approved by Michigan, would thus allow Ford to exceed even its 1971 projection to meet the state's water quality standards.

modification, therefore the action was arbitrary and an abuse of discretion.² It is this point at which I depart from the majority. In my view it is precisely because flow augmentation is not specifically approved as a means of achieving acceptable concentrations under Michigan's water quality standards that the EPA is justified in intervening. Further, I am unwilling to compel that agency to promulgate regulations respecting flow augmentation as a condition to exercising its veto powers upon the facts here.

To be lawful under Section 301(a) of the Act, 33 U.S.C. § 1311(a), a discharge must satisfy carefully delineated exceptions set forth in the other sections of the Act. In other words, unless a discharge of pollutants can be shown to be legal, it is illegal under Section 301(a).³

The effect of the majority opinion is to require the EPA to point to a regulation which outlaws the flow augmentation technique before it can act. No doubt the potential means of evading the operation of the Act are myriad if the plain command of Section 301 is to be ignored. It was, in my judgment, precisely because such loopholes could not be anticipated that Congress couched the Act in such bold, prohibitory terms.⁴

While it is not necessary to hold that flow augmentation is implicitly forbidden by the FWPCA, there is much within

² A review of the record dispels the idea that the EPA's action usurped Michigan's role in the state-administered plan for issuing NPDES permits. This permit is the only one of 1,479 NPDES permits issued by the State of Michigan to be voted by the EPA as of December 31, 1976, indicating the agency's restrained use of its statutory veto power. This is not, therefore, a case of bureaucratic caprice run riot.

³ Obviously Section 301(a) of the Act, 33 U.S.C. § 1311(a), is a guideline and requirement of the Act which would validate the Administrator's action in disapproving the permit modification. See *American Iron and Steel Institute v. EPA*, 526 F. 2d 1027, 1039-40, (3rd Cir. 1975).

⁴ The breadth of Section 301, of course, is altogether consistent with the national goal of the Act "... that the discharge of pollutants into the navigable waters be eliminated by 1985." Section 101(a)(1) of the Act, 33 U.S.C. § 1251 (a)(1).

the Act and its history to support such a view. Congress chose the phrase "effluent limitation" to describe the means for obtaining water quality. Section 302 of the Act, 33 U.S.C. § 1312.⁵ As we noted in *Big Rivers Electric Corp. v. EPA*, 523 F. 2d 16 (6th Cir. 1975), *cert. denied* 425 U.S. 924 (1976), the concept "emission limitation" in the Clean Air Act requires regulation of "the amount of [a pollutant] which may be included in the emission from a given source." *Id.* at 22 (emphasis in original). A consistent construction of "effluent limitation" in the FWPCA suggests a similar intent on the part of Congress to achieve water quality by controlling quantity. Indeed, the definition of "effluent limitation" in the FWPCA denotes a concern for restricting the amount of pollutants:

The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters

Section 502(11) of the Act, 33 U.S.C. § 1362(11); See *American Iron & Steel Institute v. EPA*, 543 F. 2d 521, 528 (3d Cir. 1976).

Such a view is fully substantiated in the legislative history. The goals and policy of Congress, as declared in the statute itself, include the prevention, reduction and elimination of pollutants from the nation's water. Section 101(b) of the Act, 33 U.S.C. § 1251(b). The statute, needless to say, does not speak in terms of dilution. It is significant, however, that the Conference Committee replaced the words "abate" and "abatement" with "reduction" and "elimination" in Sections 101 and 102, 33 U.S.C. §§ 1251, 1252. S. Conf. Rep. 92-1236,

⁵ In addition, the nationwide system of discharge permits, which governs Ford's Monroe plant and thousands of other point sources, is formally entitled the National Pollution Discharge Elimination System. Section 402 of the Act, 33 U.S.C. § 1342 (Emphasis added).

92d Cong., 2d Sess. (1972), *reprinted in* 2 U.S. Code Cong. & Admin. News at 3778 (1972). Flow augmentation, it is agreed, simply reduces the concentration of pollutants introduced into a body of water. It does not, however, eliminate or reduce the quantity of the pollution.

A further indication of national policy is to be gleaned from Section 102(b)(1) of the Act, 33 U.S.C. § 1252(b)(1), which states:

In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that *any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source.* (Emphasis added).

The flow augmentation contemplated by Section 102(b)(1) involves the release of impounded waters at a time of low flow. The Act notes that such augmentation shall not be a substitute for "adequate treatment or other methods of controlling waste at the source."⁶

The Conference Committee Report noted with respect to Section 102(b)(1):

The Conference substitute specifically bans pollution dilution as an alternative to waste treatment. At the same time it recognizes that stream flow augmentation may be useful as a means of reducing the environmental impact of runoff from non-point sources. The Conference substitute also recognizes that stream flow augmentation may be useful for recreational, navigation, and other purposes. Finally, section 102(b) [33 U.S.C. § 1252(b)] specifically sets forth that any calculation for the need

⁶ The EPA takes the view that "adequate treatment" means the best available technology (BAT). Memorandum from EPA General Council to Regional Administrators and State NPDES Directors at 4. (November 8, 1976). See generally Section 301(b)(2) of the Act, 33 U.S.C. § 1311(b)(2).

for and value of stream flow augmentation to reduce the impact of pollution must be determined by the Administrator of the Environmental Protection Agency.⁷ (Emphasis added).

S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. (1972), *reprinted in* 2 U.S. Code Cong. & Admin. News at 3778-79 (1972).

Without question, Ford's Monroe plant is a "point source," as defined in Section 502(14) of the Act, 33 U.S.C. § 1362(14), and is thus not within the qualified exception recognized in the Conference Committee Report. The conclusion is inescapable that the drafters of the FWPCA did not intend industrial dischargers of waste materials from point sources such as Ford's Raisin River plant to achieve statutory compliance by using dilution as a substitute for waste treatment.

The EPA's position also finds analogous support in our court's interpretation of the Clean Air Act. In *Big Rivers, supra*, the Administrator had disapproved the Kentucky state implementation plan submitted under the Clean Air Act. We upheld the Administrator's view that the dispersal of airborne contaminants was not a satisfactory means of achieving emission limitations, expressly approving similar reasoning in *National Resources Defense Council, Inc. v. EPA*, 489 F. 2d 390 (5th Cir. 1974), *rev'd in part on other grounds sub nom. Train v. National Resources Defense Council, Inc.*, 421 U.S. 60 (1975). See 523 F. 2d at 20-22. In *NRDC v. EPA*, the Fifth

⁷ The Act authorizes the Administrator to determine the value of flow regulation to achieve water quality:

(2) The need for and the value of storage for regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies.

(3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator. . . .

Section 102(b)(2), (3) of the Act, 33 U.S.C. § 1252(b)(2), (3).

Circuit determined that the use of tall smokestacks merely achieved a dispersion of pollutants and did not limit the quantities emitted. The "tall stacks" technique was judged to be an inadequate means of attaining national primary ambient air quality standards.⁸ Flow augmentation is analogous to the use of tall stacks in that it facilitates the dispersion of pollutants but does not reduce the quantity disseminated into the waters.⁹

Finally turning to the Michigan Water Quality Standards themselves, they provide that:

[t]he water quality standards prescribed by these rules for the various designated uses of the waters of the state apply to receiving waters . . .

Michigan Water Quality Standards, Michigan Admin. Code, Part 4, Rule 323.1090. "Receiving waters" is defined therein as "the waters of the state into which an effluent is or may be discharged." *Id.*, Rule 323.1044(f). A natural construction of the terms "receiving waters" and "the waters of the state," would not normally be thought to include waters which the polluter has artificially diverted from elsewhere into the stream in order to dilute the pollution. The concentrations expressed in the water quality standards applicable to the receiving waters of the Raisin River appear wholly con-

⁸ National primary ambient air quality standards resemble water quality standards under the FWPCA in that both depend upon the aggregate of pollution over a given area or in a given watercourse rather than the pollution derived from any single source, *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 205 n. 12 (1976) (water quality standards); *Train v. NRDC*, *supra*, 421 U.S. at 65, 78 (national primary ambient air quality standards).

⁹ Congress recently amended the Clean Air Act with respect to tall stacks and other dispersion techniques. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 123, 91 Stat. 721 (1977). As the legislative history makes explicit, Congress intended to endorse and codify the view of *Big Rivers* and *NRDC v. EPA* that dispersion is an inadequate substitute for treatment. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 91-92, reprinted in U.S. Code Cong. & Admin. News at 2300 (1977).

sistent with the Administrator's position and are inconsistent with the manipulation of flow contemplated by Ford.

Further, I cannot agree with the majority that we should take so grudging a view of the EPA's articulated basis for the exercise of its veto. It is true, as the majority notes, that it is not for the courts to provide *post hoc* rationalization for an agency's action which that agency has not itself given. It is also, however, true that our scope of review is a narrow one and that an agency decision of less than ideal clarity will be upheld "if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974), quoting *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 521, 589 (1945). The majority opinion would appear to confine the EPA to the grounds asserted in its letter of January 22, 1976, vetoing the permit modification. However, accompanying that letter was a memorandum dated January 14, 1976, which the veto letter incorporated by reference. The January 22 letter stated:

Flow augmentation is not consistent with the requirements of the in-stream concentration limits contained in water quality standards.

The January 14 memorandum added:

In the instant case, the upstream concentration of pollutants expressed as pounds based on total river flow *plus* the BPT [best practicable technology] allowance of pounds of pollutants discharged after dilution exceed the in-stream concentration limitations. We, therefore, do not see flow augmentation as being consistent with the requirements of the *in-stream* concentration limits contained in the water quality standards. (Emphasis in original).

The only reasonable construction of the January 14 and January 22 memoranda in the context of the EPA's veto of the proposed permit modification is that simply satisfying the

best practicable technology requirement contained in effluent limitation standards would be insufficient if in-stream concentration limits, without flow augmentation, still could not be met.¹⁰ This is exactly the situation contemplated by the Supreme Court in *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205 n.12 (1976). The EPA thus expressed with clarity its view that the flow augmentation was not permitted by the water quality standards, which rest on in-stream concentrations of pollutants. It therefore concluded that no authority could be found in Michigan water quality standards for enhancing the flow of a watercourse to achieve lawful pollutant concentrations. Because the water quality standards thus do not immunize the otherwise-unlawful discharge, Section 301(a) of the Act, 33 U.S.C. § 1311(a), applies to forbid the discharge.

Contrary to the view of the majority, I would hold that the path of the agency's reasoning is sufficiently clear from its veto correspondence and does not constitute a *post hoc* rationalization.

Finally, I am unable to join in attributing a legal distinction to permits of "major" and minor significance. The majority apparently concludes that the Administrator's veto will be summarily set aside if the permit is not of major significance — a conclusion which I am unable to draw from the authorities cited.¹¹

Congress undoubtedly intended that, where states qualified themselves to issue NPDES permits, the great bulk of the

¹⁰ Under the FWPCA, discharge permits issued by the State of Michigan, pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), require the discharger to conform both to the effluent limitations promulgated by the EPA and the water quality standards adopted by the state. Section 402(b)(1)(A) of the Act, 33 U.S.C. § 1342(b)(1)(A).

¹¹ The majority finds the proposed permit modification to be of major significance, apparently not because of its impact on the Raisin River or Lake Erie but because the permit raises an issue of major significance, the use of flow augmentation to achieve water quality standards.

work was to be performed by the state and that, to this extent, the EPA would be relieved of a great deal of responsibility which would otherwise be vested solely in it. This, however, is a far cry from holding that there is any statutory limitation upon the powers of the EPA under Section 402(d)(2) of the Act, 33 U.S.C. § 1342(d)(2). As the Second Circuit noted in *Mianus River Preservation Committee v. Administrator, EPA*, 541 F. 2d 899, 907 (2d Cir. 1976):

Just how active a role the Administrator was expected to play in reviewing each particular State permit application is unclear from the statute itself. Section 402(d)(2) [33 U.S.C. § 1342(d)(2)], of course, gives the Administrator the power to review and reject any particular individual application for a State permit. Yet seemingly in the same breath, § 402(d)(3) [33 U.S.C. § 1342(d)(3)]¹² relieves him of any duty to do either. The review power, as taken from the words of the statute, seems to be entirely discretionary. The legislative history of § 402 confirms that view and further shows that Congress intended that the Administrator should, more often than not, take no "action" with respect to proposed State permits.

I would hold, with the Second Circuit, that the review power under the Act is entirely discretionary with the EPA and is not limited to permits of major significance. The key to the system of review devised by Congress is a practical flexibility, with the EPA itself judging when the circumstances warrant its intervention. I would hold instead that any unlawful permit outside the guidelines and requirements of the Act would be the appropriate subject for a veto in the discretion of the EPA, *Appalachian Power Co. v. Train*, 545 F. 2d 1351, 1358 (4th Cir. 1976). Contrary to the majority, I do not

¹² Section 402(d)(3) of the Act, 33 U.S.C. § 1342(d)(3), allows the Administrator to waive his power to veto a state-issued permit which is "outside the guidelines and requirements" of the Act.

understand *National Resources Defense Council, Inc. v. Train*, 510 F. 2d 692, 709 (D. C. Cir. 1975), to establish a test of "major significance" for judging the Administrator's authority in reviewing state-issued permits under Section 402(d) (2) of the Act, 33 U.S.C. § 1342(d) (2).

Had the EPA approved water quality standards for the State of Michigan expressly providing for flow augmentation, there would be much more force to the claim that its veto was arbitrary and capricious. As the majority concedes, however, the standards are silent as to flow augmentation. It is not for us to speculate that the Administrator approved or would have approved the use of flow augmentation, when such an inference is obviously inconsistent with the objectives of the Act and results in a strained construction of the water quality standards themselves.

The Administrator, in vetoing the proposed permit modification, has expressed his view that flow augmentation is an impermissible means of attaining the concentrations of pollutants contained in the water quality standards of Michigan. As our court held in *Big Rivers, supra*, "interpretations of this complex statute [the Clean Air Act] by the agency charged with administering it are entitled to great deference." 523 F. 2d at 22. Similar deference should be given to the EPA's interpretation of the FWPCA and of the state water quality standards, the text of which the agency itself reviewed and approved. *American Iron & Steel Institute v. EPA*, 543 F. 2d 521, 526 (3d Cir. 1976). In my view the Administrator was justified in concluding that flow augmentation was not a permissible technique for achieving water quality standards, since no express authorization in the Act or regulations can be found to support it. I would deny the petition for review and affirm the action of the Administrator.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2056

* NATURAL RESOURCES DEFENSE COUNCIL, INC.

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NATIONAL FOREST PRODUCTS ASSOCIATION, APPELLANT

No. 75-2066

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC.

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NATIONAL MILK PRODUCERS FEDERATION, APPELLANT

No. 75-2067

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC.

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
APPELLANTS

* For convenience the court will refer to this case hereafter as NRDC v. Costle [Runoff Point Sources].

No. 75-2235

NATURAL RESOURCES DEFENSE COUNCIL, INC.

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
COLORADO RIVER WATER CONSERVATION DISTRICT,
APPELLANT

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil 1629-73)

Argued December 3, 1976

Decided November 16, 1977

Irvin B. Nathan, with whom *Burton J. Mallinger* was
on the brief, for appellant in No. 75-2056.

Charles W. Bills, with whom *James R. Murphy* was on
the brief for appellant in No. 75-2066.

G. William Frick, Attorney, Department of Justice, of
the bar of the Supreme Court of Missouri, *pro hac vice*
by special leave of court for appellants in No. 75-2067.
Peter R. Taft, Assistant Attorney General, *Robert V.*
Zener, General Counsel, Environmental Protection Agency,
Edmund B. Clark, *Lloyd S. Guerci*, *Larry A. Boggs*, At-
torneys Department of Justice and *Pamela P. Quinn*, At-
torney Environmental Protection Agency were on the
brief for appellants in No. 75-2067.

Christopher D. Williams, with whom *Kenneth Balcomb*
and *Robert L. McCarty* were on the brief for appellant in
No. 75-2235.

J. G. Speth for appellee.

Theodore O. Torve, Assistant Attorney General, State of
Washington filed a brief on behalf of the State of Wash-
ington as amicus curiae urging reversal in No. 75-2056.

Richard E. Schwartz filed a brief on behalf of Iron and
Steel Institute as amicus curiae urging reversal in No. 75-
2067.

John L. Hill, Attorney General, State of Texas and
David M. Kendall, First Assistant Attorney General, State
of Texas filed a brief on behalf of State of Texas as
amicus curiae urging reversal in No. 75-2067.

Before: BAZELON, Chief Judge, LEVENTHAL and MAC-
KINNON, Circuit Judges.

Opinion for the Court filed by Circuit Judge LEVENTHAL.

Concurring Opinion filed by Circuit Judge MACKINNON.

LEVENTHAL, Circuit Judge: In 1972 Congress passed
the Federal Water Pollution Control Act Amendments
[hereafter referred to as the "FWPCA" or the "Act"]¹.
It was a dramatic response to accelerating environmental
degradation of rivers, lakes and streams in this country.
The Act's stated goal is to eliminate the discharge of
pollutants into the Nation's waters by 1985. This goal is
to be achieved through the enforcement of the strict time-
tables and technology-based effluent limitations established
by the Act.

¹ 33 U.S.C. §§ 1251-1376 (Supp. V 1975). Although char-
acterized in the official title as "amendments", the 1972
FWPCA actually substitutes its provisions for those of the
pre-1972 Federal Water Pollution Control Act as amended,
id. §§ 1151-1175 (1970).

The FWPCA sets up a permit program, the National Pollutant Discharge Elimination System (NPDES), as the primary means of enforcing the Act's effluent limitations.² At issue in this case is the authority of the Administrator of the Environmental Protection Agency to make exemptions from this permit component of the FWPCA.

Section 402 of the FWPCA, 33 U.S.C. § 1342 (Supp. V 1975), provides that under certain circumstances the EPA Administrator "may . . . issue a permit for the discharge of any pollutant" notwithstanding the general prescription of pollutant discharges found in § 301 of the Act. 33 U.S.C. § 1311 (Supp. V 1975). The discharge of a pollutant is defined in the FWPCA as "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft." 33 U.S.C. § 1362(12) (Supp. V 1975). In 1973 the EPA Administrator issued regulations that exempted certain categories of "point sources" of pollution from the permit requirements of § 402.³ The Administrator's purported authority to make such exemptions turns on the proper interpretation of § 402.

A "point source" is defined in § 502(14) as "any discernible, confined and discrete conveyance, including but

² This case deals with § 402 of the FWPCA, 33 U.S.C. § 1342 (Supp. V 1975), which sets out the permitting authority of the EPA Administrator as well as that of the states under EPA-approved state permit programs. The Secretary of the Army also has a permitting authority in certain circumstances. Under § 404 of the FWPCA, 33 U.S.C. § 1344 (Supp. V 1975), he may issue permits for the discharge of dredged or fill material into navigable waters.

³ 40 C.F.R. § 125.4 (1975). See 38 Fed. Reg. 18000-04 (1973).

not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."⁴

The 1973 regulations exempted discharges from a number of classes of point sources from the permit requirements of § 402, including all silvicultural point sources; all confined animal feeding operations below a certain size; all irrigation return flows from areas of less than 3,000 contiguous acres or 3,000 noncontiguous acres that use the same drainage system; all nonfeedlot, nonirrigation agricultural point sources; and separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity.⁵ The EPA's rationale for

⁴ 33 U.S.C. § 1362(14) (Supp. V 1975).

⁵ 40 C.F.R. § 125.4 (1975):

The following do not require an NPDES permit:

. . .

(f) Uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity, unless the particular storm runoff discharge has been identified by the Regional Administrator, the State water pollution control agency or an interstate agency as a significant contributor of pollution. (It is anticipated that significant contributors of pollution will be identified in connection with the development of plans pursuant to section 303(e) of the Act. This exclusion applies only to separate storm sewers. Discharges from combined sewers and bypass sewers are not excluded.)

. . .

(j) Discharges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:

these exemptions is that in order to conserve the Agency's enforcement resources for more significant point sources of pollution, it is necessary to exclude these smaller sources of pollutant discharges from the permit program.

(1) Discharges from animal confinement facilities, if such facility or facilities contain, or at any time during the previous 12 months contained, for a total of 30 days or more, any of the following types of animals at or in excess of the number listed for each type of animal:

- (i) 1,000 slaughter and feeder cattle;
- (ii) 700 mature dairy cattle (whether milkers or dry cows);
- (iii) 2,500 swine weighing over 55 pounds;
- (iv) 10,000 sheep;
- (v) 55,000 turkeys;
- (vi) If the animal confinement facility has continuous overflow watering, 100,000 laying hens and broilers;
- (vii) If the animal confinement facility has liquid manure handling systems, 30,000 laying hens and broilers;
- (viii) 5,000 ducks;

(2) Discharges from animal confinement facilities, if such facility or facilities contain, or any time during the previous 12 months contained for a total of 30 days or more, a combination of animals such that the sum of the following numbers is 1,000 or greater: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 55 pounds multiplied by 0.4, plus the number of sheep multiplied by 0.1;

(3) Discharges from aquatic animal production facilities;

(4) Discharges of irrigation return flow (such as tailwater, tile drainage, surfaced groundwater flow or bypass water), operated by public or private or-

The National Resources Defense Council, Inc. (NRDC) sought a declaratory judgment that the regulations are unlawful under the FWPCA. Specifically, NRDC contended that the Administrator does not have authority to exempt any class of point source from the permit requirements of § 402. It argued that Congress in enacting §§ 301, 402 of the FWPCA intended to prohibit the discharge of pollutants from *all* point sources unless a permit had been issued to the discharger under § 402 or unless the point source was explicitly exempted from the permit requirements by statute. The District Court granted NRDC's motion for summary judgment. It held that the FWPCA does not authorize the Administrator to exclude any class of point sources from the permit program. *NRDC v. Train*, 396 F. Supp. 1393 (D.D.C. 1975). The EPA has appealed to this court. It is joined on appeal by a number of defendant-intervenors, National Forest Products Association (NFPA), National Milk Producers Federation (NMPF), and the Colorado River Conservation District.*

This case thus presents principally a question of statutory interpretation. EPA also argues that even if Con-

ganizations or individuals, if: (1) There is a point source of discharge (e.g., a pipe, ditch, or other defined or discrete conveyance, whether natural or artificial) and; (2) the return flow is from land areas of more than 3,000 contiguous acres, or 3,000 non-contiguous acres which use the same drainage system; and

(5) Discharges from any agricultural or silvicultural activity which have been identified by the Regional Administrator or the Director of the State water pollution control agency or interstate agency as a significant contributor of pollution.

* Briefs as *amicus curiae* were filed by the American Iron and Steel Institute, the State of Texas, and the State of Washington, Department of Natural Resources.

gress intended to include the pertinent categories in the permit program, the regulations exempting them should be upheld on a doctrine of administrative infeasibility, i.e., the regulations should be upheld as a deviation from the literal terms of the FWPCA that is necessary to permit the Agency to realize the principal objectives of the Act.

I. LEGISLATIVE HISTORY

The principal purpose of the FWPCA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁷ The Act's ultimate objective, to eliminate the discharge of pollutants into navigable waters by 1985, is to be achieved by means of two intermediate steps. As of July 1, 1977, all point sources other than publicly owned treatment works were to have achieved effluent limitations that require application of the "best practicable control technology."⁸ These same point sources must reduce their effluent discharges by July 1, 1983 to meet limitations determined by application of the "best available technology economically achievable" for each category of point source.⁹

The technique for enforcing these effluent limitations is straightforward. Section 301(a) of the FWPCA provides:

Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.¹⁰

Appellants concede that if the regulations are to be valid, it must be because they are authorized by § 402; none of

⁷ 33 U.S.C. § 1251(a) (Supp. V 1975).

⁸ 33 U.S.C. § 1311(b) (1) (A) (Supp. V 1975).

⁹ *Id.* § 1311(b) (2) (A).

¹⁰ *Id.* § 1311(a).

the other sections listed in § 301(a) afford grounds for relieving the exempted point sources from the prohibition of § 301.¹¹

Section 402 provides in relevant part that

the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of the necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

The NPDES permit program established by § 402 is central to the enforcement of the FWPCA. It translates general effluent limitations into the specific obligations of a discharger. As this court noted in *NRDC v. Train*, 166 U.S.App.D.C. 312, 315, 510 F.2d 692, 695 (1975), the

¹¹ Section 302, 33 U.S.C. § 1312 (Supp. V 1975), permits the Administrator to set water quality related effluent limitations or control strategies where technology-based limitations are inadequate. Section 306, 33 U.S.C. § 1316 (Supp. V 1975), instructs the EPA Administrator to promulgate standards of performance for new sources of pollution constructed after those standards are proposed. Section 307, 33 U.S.C. § 1317 (Supp. V 1975), gives the EPA Administrator the authority to issue generally applicable effluent standards with respect to toxic substances and to require pretreatment of some pollutants before their introduction into treatment works. By virtue of § 318, 33 U.S.C. § 1328 (Supp. V 1975), the Administrator may "permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision." Section 404, 33 U.S.C. § 1344 (Supp. V 1975), gives the Secretary of the Army authority to issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

Act "relies primarily on a permit program for the achievement of effluent limitations . . . to attain its goals." The comments in floor debates of Senator Muskie, the leading Congressional sponsor of the Act, makes this clear.¹²

The appellants argue that § 402 not only gives the Administrator the discretion to grant or refuse a permit, but also gives him the authority to exempt classes of point sources from the permit requirements entirely. They argue that this interpretation is supported by the legislative history of § 402 and the fact that unavailability of this exemption power would place unmanageable administrative burdens on the EPA.

Putting aside for the moment the appellants' administrative infeasibility argument, we agree with the District Court that the legislative history makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of § 301(a). This intention is evident in both Committee Reports. In discussing § 301 the House Report stressed:

Any discharge of a pollutant without a permit issued by the Administrator under section 318, or by the Administrator or the State under section 402 or by the Secretary of the Army under section 404 is unlawful. Any discharge of a pollutant not in compliance with the conditions or limitations of such a permit is also unlawful.¹³

¹² "The Administrator of the Environmental Protection Agency is authorized to regulate discharge of pollutants through the use of an expanded permit program." 117 Cong. Rec. 38800 (1971) (Senator Muskie) (emphasis added), reprinted in 2 Environmental Policy Div., Congressional Reference Serv., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1259 (Senate Public Works Comm. Print 1973) [hereinafter cited as Legislative History].

¹³ H. Rep. No. 92-911, 92d Cong., 2d Sess. 100 (1972), reprinted in Legislative History at 787.

The Senate Report echoed this interpretation:

[Section 301] clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing of wastes.

The program proposed by this Section will be implemented through permits issued in Section 402. The Administrator will have the capability and the mandate to press technology and economics to achieve those levels of effluent reduction which he believes to be practicable in the first instance and attainable in the second.¹⁴

The EPA argues that since § 402 provides that "the Administrator *may* . . . issue a permit for the discharge of any pollutant" (emphasis added), he is given the discretion to exempt point sources from the permit requirements altogether. This argument, as to what Congress meant by the word "may" in § 402, is insufficient to rebut the plain language of the statute and the committee reports. We say this with due awareness of the deference normally due "the construction of a new statute by its implementing agency." *NRDC v. Train*, 166 U.S. App.D.C. at 326, 510 F.2d at 706; see *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The use of the word "may" in § 402 means only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of § 301. This is the natural reading, and the one that retains the fundamental logic of the statute.

¹⁴ S. Rep. No. 92-414, 92d Cong., 1st Sess. 42 (1971), reprinted in Legislative History at 1460.

Under the EPA's interpretation the Administrator would have broad discretion to exempt large classes of point sources from any or all requirements of the FWPCA. This is a result that the legislators did not intend. Rather they stressed that the FWPCA was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type. A statement of Senator Jennings Randolph of West Virginia, Chairman of the Senate Committee responsible for the Act, is illustrative.

I stress very strongly that Congress has become very specific on the steps it wants taken with regard to environmental protection. We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives for administrators to follow

In the past, too many of our environmental laws have contained vague generalities. What we are attempting to do now is provide laws that can be administered with certainty and precision. I think that is what the American people expect that we do.¹⁵

¹⁵ 117 Cong. Rec. 38805 (1971), *reprinted in Legislative History* at 1272. *See also* the comments of Senator Montoya on the original Senate bill.

Your committee has placed before you a tough bill. This body and this Nation would not have it be otherwise. Our legislation contains an important principle of psychology: Men seldom draw the best from themselves unless pressed by circumstances and deadlines. This bill contains deadlines and it imposes rather tough standards on industry, municipalities, and all other sources of pollution. Only under such conditions are we likely to press the technological threshold of invention into new and imaginative developments that will allow us to meet the objectives stated in our bill.

117 Cong. Rec. 38808 (1971), *reprinted in Legislative History* at 1278.

There are innumerable references in the legislative history to the effect that the Act is founded on the "basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful."¹⁶ Even when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement.¹⁷ We stand by our previous interpretation of the

¹⁶ 118 Cong. Rec. 10215 (1972) (Rep. Clausen), *reprinted in Legislative History* at 378. *See, e.g.,* H.R. Rep. No. 92-911 92d Cong., 2d Sess. 100 (1972), *reprinted in Legislative History* at 787; S. Rep. No. 92-414; 92d Cong., 1st Sess. 42-43 (1971), *reprinted in Legislative History* at 1460-61; 118 Cong. Rec. 10661 (1972) (Rep. Podell), *reprinted in Legislative History* at 574.

¹⁷ The House rejected an amendment designed to avoid the problems of including irrigation return flows in the permit program. Congressman Teno Roncalio of Wyoming offered an amendment on the floor of the House that would have explicitly exempted irrigated agriculture from the NPDES permit program.

Mr. RONCALIO. . . .

I offer my amendment so that a serious omission to H.R. 11896 can be corrected before we end up with a law that would be virtually impossible to enforce. My amendment would specifically exempt irrigated agriculture from sections 301(a), 302 and 304 of the Federal Water Pollution Control Act.

I think my colleagues will agree that the type of salinity problems created by irrigation runoff are simply not as alarming as the more common pollutants discharged by industrial and municipal facilities. Substantial salinity concentrations have little effect on recreational use of water or its suitability for the propagation of fish.

My amendment is necessary, Mr. Chairman, because at the present time we could not enforce pollution control on irrigation systems. It is virtually impossible to trace pollutants to specific irrigation lands, making these pollutants a nonpoint source in most cases. Second, we do not

Act's scheme for the enforcement of effluent limitations:

After dates set forth in [§ 301(b)], a person must obtain a permit and comply with its terms in order to discharge *any* pollutant. The conditions of the permit must assure that any discharge complies with the applicable requirements of numerous sections including the effluent limitations of section 301(b).

NRDC v. Train, 166 U.S.App.D.C. at 316, 510 F.2d at 696 (emphasis added; footnotes omitted).

We also note that all the Supreme Court decisions referring to § 402 view the permit as the only means by which a point source polluter can avoid the ban on discharges found in § 301. Strictly speaking these expressions may be dicta, for they do not touch directly on the interpretation of § 402. But they are at least a considered reading of what the Act appears to mean.

In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), Justice Marshall characterized the enforcement scheme of the FWPCA as follows:

[E]ffluent limitations are enforced through a permit program. The discharge of "pollutants" into water is unlawful without a permit issued by the Administrator of the EPA or, if a State has developed a program that complies with the FWPCA, by the State. . . .

Id. at 7 (footnote omitted).

have the technology to deal with irrigation runoff (as contrasted to industrial pollution) and if we begin making laws to control something that cannot be handled with our given technological knowledge, we will be doing many thousand farmers and ranchers a great disservice. In fact, we will be doing the Federal Government a great disservice if we actually pass a Federal water pollution control bill that cannot be fully enforced.

118 Cong. Rec. 10764-65 (1972), reprinted in *Legislative History* at 651. The amendment was rejected.

In *EPA v. State Water Resources Control Board*, 426 U.S. 200 (1976), the issue was whether federal installations were subject to state NPDES programs. Justice White's majority opinion described NPDES at 205 (footnote omitted):

Under NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits.

In *E. I. du Pont de Nemours v. Train*, 430 U.S. 112 (1977), the Court held that under FWPCA the EPA can set uniform effluent limitations through industry-wide regulations rather than develop them on an individual basis during the permit issuance process. But the Court, per Justice Stevens, clearly indicated that those limitations were translated into obligations of the discharger through their inclusion in an NPDES permit. *Id.* at 119-20.

The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute. In holding that the FPC does not have authority to exempt the rates of small producers from regulation under the Natural Gas Act, the Supreme Court observed:

It is not the Court's role . . . to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest

may be considered from the multifaceted points of view of the representational process.

FPC v. Texaco, Inc., 417 U.S. 380, 400 (1974).

II. ADMINISTRATIVE INFEASIBILITY

The appellants have stressed in briefs and at oral argument the extraordinary burden on the EPA that will be imposed by the above interpretation of the scope of the NPDES program. The spectre of millions of applications for permits is evoked both as part of appellants' legislative history argument—that Congress could not have intended to impose such burdens on the EPA—and as an invitation to this court to uphold the regulations as deviations from the literal terms of the FWPCA necessary to permit the agency to realize the general objectives of that act. During oral argument we asked for supplemental briefs so that the appellants could expand on their infeasibility arguments. We consider EPA's infeasibility contentions in turn.

A. Uniform National Effluent Limitations

EPA argues that the regulatory scheme intended under Titles III and IV of the FWPCA requires, first, that the Administrator establish national effluent limitations¹⁸ and, second, that these limitations be incorporated in the individual permits of dischargers. EPA argues that the establishment of such limitations is simply not possible

¹⁸ See FWPCA § 502(11), 33 U.S.C. § 1362(11) (Supp. V 1975):

The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

with the type of point sources involved in the 1973 regulations, which essentially involve the discharge of runoff—i.e., wastewaters generated by rainfall that drain over terrain into navigable waters, picking up pollutants along the way.

There is an initial question, to what extent point sources are involved in agricultural, sivicultural, and storm sewer runoff. The definition of point source in § 502(14), including the concept of a "discrete conveyance", suggests that there is room here for some exclusion by interpretation. We discuss this issue subsequently. Meanwhile, we assume that even taking into account what are clearly point sources, there is a problem of infeasibility which the EPA properly opens for discussion.

EPA contends that certain characteristics of runoff pollution make it difficult to promulgate effluent limitations for most of the point sources exempted by the 1973 regulations:

The major characteristic of the pollution problem which is generated by runoff . . . is that the owner of the discharge point . . . has no control over the quantity of the flow or the nature and amounts of the pollutants picked up by the runoff. The amount of flow obviously is unpredictable because it results from the duration and intensity of the rainfall event, the topography, the type of ground cover and the saturation point of the land due to any previous rainfall. Similar factors affect the types of pollutants which will be picked up by that runoff, including the type of farming practices employed, the rate and type of pesticide and fertilizer application, and the conservation practices employed

An effluent limitation must be a precise number in order for it to be an effective regulatory tool; both the discharger and the regulatory agency need to have an identifiable standard upon which to deter-

mine whether the facility is in compliance. That was the principal of the passage of the 1972 Amendments.

Federal Appellants' Memorandum on "Impossibility" at 7-8 (footnote omitted). Implicit in EPA's contentions is the premise that there must be a uniform effluent limitation prior to issuing a permit. That is not our understanding of the law.

In *NRDC v. Train*, we described the interrelationship of the effluent limitations and the NPDES permit program, 166 U.S.App.D.C. at 327, 510 F.2d at 707 (footnotes omitted):

The Act relies on effluent limitations on individual point sources as the "basis of pollution prevention and elimination." . . . Section 301(b) contains a broad description of phase one and phase two effluent limitations, to be achieved by July 1, 1977 and July 1, 1983, respectively. The limitations established under section 301(b) are to be imposed upon individual point sources through permits issued under the National Pollutant Discharge Elimination System (NPDES) established by section 402. Those permits are to contain schedules which will assure phased compliance with the effluent limitations no later than the final dates set forth in section 301(b). Section 304(b) calls for the publication of regulations containing guidelines for effluent limitations for classes and categories of point sources. These guidelines are intended to assist in the establishment of section 301(b) limitations that will provide uniformity in the permit conditions imposed on similar sources within the same category by diverse state and federal permit authorities.

As noted in *NRDC v. Train*, the primary purpose of the effluent limitations and guidelines was to provide uniformity among the federal and state jurisdictions enforcing the NPDES program and prevent the "Tragedy of the

Commons"¹⁹ that might result if jurisdictions can compete for industry and development by providing more liberal limitations than their neighboring states. 510 F.2d at 709. The effluent limitations were intended to create floors that had to be respected by state permit programs.

But in *NRDC v. Train* it was also recognized that permits could be issued before national effluent limitations were promulgated and that permits issued subsequent to promulgation of uniform effluent limitations could be modified to take account of special characteristics of sub-categories of point sources.

Prior to the promulgation of effluent limitations under section 301, the director of a state program is instructed merely to impose such terms and conditions in each permit as he determines are necessary to carry out the provisions of the Act. Once an effluent limitation is established, however, the state director and the regional EPA Administrator are required to apply the specified, uniform effluent limitations,

¹⁹ As one commentator has recently written:

The Tragedy of the Commons arises in noncentralized decisionmaking under conditions in which the rational but independent pursuit by each decisionmaker of its own self-interest leads to results that leave all decisionmakers worse off than they would have been had they been able to agree collectively on a different set of policies.

Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1211 (1977). The classic account of the Tragedy of the Commons can be found in Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968). Hardin makes the point in the context of sheep-grazing. Put simply, even over-simply, Hardin shows that if no one is authorized to set limits to preserve open pasture land as a whole, allowing sheep to graze on that land may lead to serious overgrazing, as each herdsman thinks only of his own advantage. The solution lies in some mandate, from above or by agreement, with sanctions to compel conformance.

modified only as necessary to take account of fundamentally different factors pertaining to particular point sources within a given class or category. Any variation in the uniform limitations adopted for specific dischargers must be approved by the Administrator.

510 F.2d at 710 (footnotes omitted).

Another passage in *NRDC v. Train* touches on the infeasibility problem. We noted that "[t]he statutory framework is not so tightly drawn as to require guidelines for each and every class and category of point source regardless of the need for uniform guidelines or to mandate that all guidelines be published prior to December 31 [1974] regardless of their quality or the burden that task would place upon the agency." *Id.* at 320-21, 510 F.2d at 710-11. In that case this court fully appreciated that technological and administrative constraints might prevent the Administrator from developing guidelines and corresponding uniform numeric effluent limitations for certain point sources anytime in the near future. The Administrator was deemed to have the burden of demonstrating that the failure to develop the guidelines on schedule was due to administrative or technological infeasibility. 510 F.2d at 713. Yet the underlying teaching was that technological or administrative infeasibility was a reason for adjusting court mandates to the minimum extent necessary to realize the general objectives of the Act.²⁰ It is a

²⁰ In *NRDC v. Train* this court stated:

A federal equity court may exercise its discretion to give or withhold its mandate in furtherance of the public interest, including specifically the interest in effectuating the congressional objective incorporated in regulatory legislation. We think the court may forebear the issuance of an order in those cases where it is convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities. The sound discretion of an equity court does not

number of steps again to suggest that these problems afford the Administrator the authority to exempt categories of point sources from the NPDES program entirely.

With time, experience, and technological development, more point sources in the categories that EPA has now classed as exempt may be amenable to national effluent limitations achieved through end-of-pipe technology or other means of pollution control. EPA has noted its own success with runoff from mining operations:

EPA has found that in the area of runoff from mining operations, there is sufficient predictability because of a longer history of regulation and the relatively confined nature of the operations that numerical limitations can be established. Thus, consistent with EPA's position stated earlier that it will expand the permit program where its capability of establishing effluent limitations allows, appropriate limitations have been created and the permit program expanded.

Federal Appellants' Memorandum on "Impossibility" at 8.

In sum, we conclude that the existence of uniform national effluent limitations is not a necessary precondition for incorporating into the NPDES program pollution from agricultural, silvicultural, and storm water runoff point sources. The technological or administrative infeasibility of such limitations may result in adjustments in the permit programs, as will be seen, but it does not authorize the Administrator to exclude the relevant point source from the NPDES program.

embrace enforcement through contempt of a party's duty to comply with an order that calls him "to do an impossibility."

166 U.S.App.D.C. at 333, 510 F.2d at 713 (footnotes omitted). For reasons stated in this opinion, we conclude that to require the EPA Administrator to include silvicultural, agricultural, and storm sewer point sources in the NPDES program is not to require him "to do an impossibility."

B. *Alternative Permit Conditions under § 402(a)*

EPA contends that even if it is possible to issue permits without national effluent limitations, the special characteristics of point sources of runoff pollution make it infeasible to develop restrictions on a case-by-case basis. EPA's implicit premise is that whether limitations are promulgated on a class or individual source basis, it is still necessary to articulate any limitation in terms of a numerical effluent standard. That is not our understanding.

Section 402 provides that a permit may be issued upon condition "that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act, or prior to taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act." 33 U.S.C. § 1342(a) (Supp. V 1975) (emphasis added). This provision gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. The permit may proscribe industry practices that aggravate the problem of point source pollution.²¹

²¹ That Congress did not regard numeric effluent limitations as the only permissible limitation on a discharger is supported by § 302(a) of the Act, 33 U.S.C. § 1312(a) (Supp. V 1975):

Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under [§ 301(b) of the Act], would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strate-

EPA's counsel caricatures the matter by stating that recognition of any such authority would give EPA the power "to instruct each individual farmer on his farming practices." Federal Appellants Memorandum on "Impossibility" at 12. Any limitation on a polluter forces him to modify his conduct and operations. For example, an air polluter may have a choice of installing scrubbers, burning different fuels or reducing output. Indeed, the authority to prescribe limits consistent with the best practicable technology may be tantamount to prescribing that technology. Of course, when alternative techniques are available, Congress intended to give the discharger as much flexibility as possible in choosing his mode of compliance. See, e.g., H. Rep. No. 92-911, 92d Cong., 2d Sess. 107, reprinted in Legislative History at 794. We only indicate here that when numerical effluent limitations are infeasible, EPA may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels. This may well mean opting for a gross reduction in pollutant discharge rather than the fine-tuning suggested by numerical limitations. But this ambitious statute is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all.

It may be appropriate in certain circumstances for the EPA to require a permittee simply to monitor and report effluent levels; EPA manifestly has this authority.²² Such permit conditions might be desirable where the full extent of the pollution problem is not known.

gies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

The emphasis has been added.

²² FWPCA § 402(a)(3), (b)(2)(B), 33 U.S.C. § 1342(a)(3), (b)(2)(B) (Supp. V 1975). EPA concedes that it has this authority. Federal Appellants' Memorandum on "Impossibility" at 14.

C. General Permits

Finally, EPA argues that the number of permits involved in the absence of an exemption authority will simply overwhelm the Agency. Affidavits filed with the District Court indicate, for example, that the number of silviculture point sources may be over 300,000 and that there are approximately 100,000 separate storm sewer point sources.²² We are and must be sensitive to EPA's concerns of an intolerable permit load. But the District Court and the various parties have suggested devices to mitigate the burden—to accommodate within a practical regulatory scheme Congress's clear mandate that all point sources have permits. All that is required is that EPA make full use of its interpretational authority. The existence of a variety of options belies EPA's infeasibility arguments.

Section 402 does not explicitly describe the necessary scope of a NPDES permit. The most significant requirement is that the permit be in compliance with limitation sections of the Act described above. As a result NRDC and the District Court have suggested the use of area or general permits. The Act allows such techniques. Area-wide regulation is one well-established means of coping with administrative exigency. An instance is area pricing for natural gas producers, which the Supreme Court upheld in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).²⁴ A more dramatic example is the administrative

²² Affidavit of William H. McCredie, Director, Industrial Forestry, of the NFPA; Affidavit of Walter G. Gilbert, Chief of the Municipal Operations Branch, Municipal Waste Water Systems Div., EPA Office of Air and Water Programs.

²⁴ In *Permian Basin*, the Supreme Court observed:

The Commission has asserted, and the history of producer regulation has confirmed, that the ultimate achievement of the Commission's regulatory purposes may easily depend upon the contrivance of more expeditious adminis-

search warrant, which may be issued on an area basis despite the normal Fourth Amendment requirement of probable cause for searching specific premises. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

In response to the District Court's order, EPA promulgated regulations that make use of the general permit device. 42 Fed. Reg. 6846-53 (Feb. 4, 1977). The general permit is addressed to a class of point source dischargers, subject to notice and opportunity for public hearing in the geographical area covered by the permit. Although we do not pass on the validity of the February, 1977, regulations, they serve to dilute an objection of wholesale infeasibility.²⁵

Our approach is not fairly subject to the criticism that it elevates form over substance, that the end result will look very much like EPA's categorical exemption. It is the function of the courts to require agencies to comply with legislative intent when that intent is clear, and to leave it to the legislature to make adjustments when the result is counterproductive.²⁶ At the same time, where

trative methods. The Commission believes that the elements of such methods may be found in area proceedings. "[C]onsiderations of feasibility and practicality are certainly germane" to the issues before us. . . . We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.

390 U.S. at 777.

²⁵ It is also of some, albeit limited, significance that the House Committee on Government Operations found EPA's administrative problems with applying the permit program to animal feedlots "grossly exaggerated." It was of the opinion that the Administrator did not have authority to exempt point sources from the NPDES program. H. Rep. No. 93-1012, 93d Cong., 2d Sess. 15-30 (1974).

²⁶ The Supreme Court recently reiterated this instruction in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976). There the

intent on an issue is unclear, we are instructed to afford the administering agency the flexibility necessary to achieve the general objectives of the Act. *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 653 (1973); *United States v. Southwestern Cable Co.*, 392 U.S. 157,

Court held that the EPA Administrator could not consider claims of technological or economic infeasibility when approving state implementation plans under the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857a-1857l (1970). Such claims were held only to be cognizable by the states in the plan design stage or by the Administrator when drawing up compliance orders. Justice Marshall, writing for the Court, emphasized that federal courts are not to ignore clear expressions of Congressional intent in order to accommodate claims of technological or economic infeasibility.

Allowing such claims to be raised by appealing the Administrator's approval of an implementation plan . . . would frustrate congressional intent. It would permit a proposed plan to be struck down as infeasible before it is given a chance to work, even though Congress clearly contemplated that some plans would be infeasible when proposed. And it would permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent. Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking. Petitioner's theory would render that considered legislative judgment a nullity, and that is a result we refuse to reach.

427 U.S. at 268-69 (footnote omitted). See also *Wilderness Society v. Morton*, 156 U.S.App.D.C. 121, 171, 479 F.2d 842, 892 (1973), *cert. denied*, 411 U.S. 917 (quoting *United States v. City and County of San Francisco*, 310 U.S. 16, 31-32 (1940): "We cannot accept the contention that administrative rulings—such as those relied on—can thwart the plain purpose of a valid law.")

177-78 (1968); *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968). These lines of authority conjoin in our approach. We insist, as the Act insists, that a permit is necessary; the Administrator has no authority to exempt point sources from the NPDES program. But we concede necessary flexibility in the shaping of the permits that is not inconsistent with the clear terms of the Act.

There is also a very practical difference between a general permit and an exemption. An exemption tends to become indefinite: the problem drops out of sight, into a pool of inertia, unlikely to be recalled in the absence of crisis or a strong political protagonist. In contrast, the general or area permit approach forces the Agency to focus on the problems of specific regions and requires that the problems of the region be reconsidered at least every five years, the maximum duration of a permit.²⁷

D. Other Interpretational Powers

Many of the intervenor-appellants appear to argue that the District Court should be reversed because the categories exempted by EPA are nonpoint sources and are not, in fact, point sources.²⁸ We agree with the District Court "that the power to define point and nonpoint sources is vested in EPA and should be reviewed by the court only

²⁷ 33 U.S.C. § 1342(a)(3), (b)(1)(B) (Supp. V 1975).

²⁸ This appears to be the position of the Colorado River Water Conservation District and the NFPA with respect to silvicultural activities, and NMPF, less obviously, with respect to small dairy farms.

We would put in the same category EPA's contention that the exempt categories are best handled under the areawide waste treatment management planning process of § 208 of the FWPCA, 33 U.S.C. § 1288 (Supp. V 1975). By its terms that section is concerned with areawide waste treatment plans that identify and control "agriculturally and silviculturally related non-point sources of pollution." *Id.* § 1288(b)(2)(F).

after opportunity for full agency review and examination." 396 F. Supp. at 1396. The only issue precisely confronted by all the parties and properly framed for our consideration is whether the Administrator has authority to exempt point sources from the NPDES program. We also think that we should, for similar reasons, not consider at this time the appropriate definition of "discharge of any pollutant" as used in § 402. The American Iron and Steel Institute as *amicus curiae* has pressed upon us the argument that the term "discharge" as used in § 402 was intended to encompass only "volitional flows" that add pollutants to navigable waters. Most forms of runoff, it is argued, do not involve volitional flows.

We assume that FWPCA, however tight in some respects, leaves some leeway to EPA in the interpretation of that statute, and in that regard affords the Agency some means to consider matters of feasibility. However, for reasons already noted, we do not consider these particular contentions as to interpretation on the merits.

III. CONCLUSION

As the Supreme Court recently stated in a FWPCA case, "[t]he question . . . is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended. . . ." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977). We find a plain Congressional intent to require permits in any situation of pollution from point sources. We also discern an intent to give EPA flexibility in the structure of the permits, in the form of general or area permits. We are aware that Congress hoped that more of the NPDES permit program would be administered by the states at this point.²⁰ But

²⁰ See, e.g., 118 Cong. Rec. 10235 (1972) (Rep. Ichord) reprinted in Legislative History at 428.

it also made provision for continuing EPA administration. Imagination conjoined with determination will likely give EPA a capability for practicable administration. If not, the remedy lies with Congress.

So ordered.

MACKINNON, *Circuit Judge*, concurring: I concur in the very sound and practical construction set forth in the foregoing opinion. Any person concerned with the actual application and enforcement of laws would necessarily be concerned by the application of the relevant legislation to all point sources in agriculture—and particularly to irrigated agriculture. Concern would also lie in the congressional admission that *present* technology is inadequate to enable our citizens to meet the standards and deadlines the Act imposes; in passing the law, Congress was relying on the future “invention [of] new and imaginative developments that will allow us to meet the objectives of our bill.”¹ In gambling parlance, Congress in enacting the law was “betting on the come.” It is relying on our citizens in the near future to develop the complex technology to meet all the law’s standards and objectives on time. The difficulty with that approach is that the hopes of Congress in this respect, like that of any gambler, might not be realized. The agency in this case, however, has shown that it takes a realistic view of both the situation and the task of meeting the difficult requirements and objectives of the Act. I sincerely hope that the ability of the agency to issue section 402 permits—including general area permits²—will permit it to meet the present and future compliance problems posed by the Act in a practical way.

¹ Comments of Senator Montoya, 117 CONG. REC. 38808 (1971), *quoted in* court’s opinion at 12, *reprinted in* Legislative History at 1278.

² As an example, an area permit with appropriate conditions and modifications could issue for the agricultural point sources within the Grand River Irrigation District, or the watershed of the Roaring Fork River and tributaries, etc.